IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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I.T.A. No.153 of 2004
Date of Decision:02.05.2007

Commissioner of Income-tax, (Central), Ludhiana

.....Appellant

Vs.

M/s Nahar Exports Ltd., Ludhiana

.....Respondent

CORAM:- HON'BLE MR. JUSTICE M.M.KUMAR
HON'BLE MR. JUSTICE RAJESH BINDAL

Present:- Mr. Sanjiv Bansal, Advocate for the revenue.

Mr. Sanjay Bansal, Senior Advocate with Ms. Suman Dhiman, Advocate for the assessee.

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RAJESH BINDAL, J.

The revenue has approached this Court by filing the present appeal, raising the following substantial questions of law, arising out of order dated 18.12.2003 passed by the Income Tax Appellate Tribunal, Chandigarh Bench `A', Chandigarh (for short, `the Tribunal') in I.T.A. No.1050/Chandi/1996 for the assessment year 1994-95:-

"1. Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that depreciation under Section 32 of the Income Tax Act, 1961 was allowable on the plant and machinery in question?

2. Whether, on the facts, and in the circumstances of the case, the Tribunal was correct in law in holding that for the purpose of computation of deduction under Section 80HHC of the Income Tax Act, 1961, Sales Tax and Central Sales Tax can not be excluded in the total turn over?

3. Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in directing computation of interest income for the purpose of

deduction under Section 80HHC as per Clause (baa) of the Explanation to Section 80HHC for computing the eligible profits and gains of business?"

Briefly, the facts as noticed in the orders passed by the authorities below are that the assessee filed its return for the assessment year in question on 30.11.1994 declaring its income at Rs.18,76,090/-. The same was processed under Section 143(1)(a) of the Income Tax Act, 1961 (for short, `the Act') vide order dated 20.6.1995. Thereafter, regular assessment proceedings are initiated by issuing notice under Sections 142 (1) and 143(2) of the Act.

Question No.1

During the course of assessment proceedings, the Assessing Officer disallowed depreciation claimed by the assessee on investment made in the garment unit on the ground that the machinery so set up was not used. In appeal, the order passed by the Assessing Officer, disallowing the claim of depreciation, was upheld. However, in further appeal before the Tribunal, the claim made by the assessee was accepted relying upon the judgment of this Court in **CIT v. Pepsu Road Transport Corporation**, (2002) 121 Taxman 232. While accepting the claim, the Tribunal observed that the machinery was kept ready for use and was in fact actually used by the assessee during the last two years when the assessee had received orders from foreign customers for the supply of garments. The same could not be used during the year in question on account of non-receipt of orders.

Learned counsel for the revenue submitted that unless the machinery is actually used, no depreciation should be allowed. However, we find that similar contention was considered by this Court in the case of **Pepsu Road Transport Corporation's case (supra)** wherein it was held that even where the machinery is kept ready for use and could not be put to use, the assessee would be entitled to depreciation as everything ages with the passage of time and even if the machinery is kept ready for use, there is a normal depreciation of value. Accordingly, the question being covered by the judgment of this Court, we answer the same against the revenue and in favour of the assessee.

Question No.2

As far as question No.2 is concerned, learned counsel for the

revenue could not dispute that identical question came up for consideration before this Court in I.T.A. No.293 of 2005 - **Commissioner of Income Tax-I, Ludhiana v. M/s Vardhman Polytex Ltd., Chandigarh Road, Ludhiana,** decided on 22.5.2006 and the same has been answered against the revenue and in favour of the assessee.

For the reasons stated in **M/s Vardhman Polytex Ltd.'s case (supra)**, the question No.2 is answered against the revenue and in favour of the assessee.

Question No.3

As far as question No.3 is concerned, the claim of the assessee is that the interest income earned by him on FDRs should be considered as income from business and profession and accordingly should be included for the purpose of computing deduction under Section 80HHC of the Act. However, the claim made by the assessee was rejected by the Assessing Officer. The Commissioner of Income Tax (Appeals) (for short, `the CIT (A)'), in appeal on this issue, confirmed the order passed by the Assessing Officer relying upon the judgment of Rajasthan High Court in **CIT v. Rajasthan Land Development Corporation** (1995) 211 ITR 597, wherein it was held that the interest income earned, even from employment of surplus funds, was liable to be assessed as income from other sources.

Still aggrieved against the order, the assessee preferred an appeal before the Tribunal. The ground of appeal raised by the assessee on this account is extracted below:-

> "That the ld. CIT(A)(C) erred in law and on facts in sustaining the decision of Assessing Officer that interest income considered as income from other sources and be excluded from profits for computation of deduction u/s 80HHC. Directions may be given to consider interest income of Rs.22,24,201/- as part of profits of business and compute deduction u/s 80HHC accordingly."

The issue was considered by the Tribunal in paras 13 and 14 of the order passed by it, which are extracted below:-

> "13. Regarding the second issue involved in ground No.4 of appeal of the assessee relating to interest income for the purposes of deduction u/s 80HHC, the ld. A.R. for the

assessee submitted that the new clause (baa) (operative for and from the asstt. year 1992-93) of the explanation to section 80HHC (which was also applicable to the instant case of the assessee for asstt. year 1994-95 under consideration before the Tribunal), the expression "profits of the business", for the purposes of section 80HHC means the profits of the business as computed under the head "profits & gains of business or profession" as reduced by 90% of any sum referred to in clauses (iiia), (iiib) and (iiic) of sec. 28 or of any receipts by way of brokerages, commission, interest, rent, charges or any other receipt of a similar nature included in such profit. Hence, according to ld. A.R. for the assessee, as per clause (baa) of the explanation to section 80HHC in order to compute profits and gains of business of the assessee for the purposes of section 80HHC, 90% of the receipts from interest are to be reduced which were included in such profits. The ld. A.R. for the assessee further contended that as per the submissions made by him, mentioned here-in-above, for computing the receipts from interest for the purposes of section 80HHC, the AO should be directed to reduce 90% of the interest receipts, which were included by him while computing such profits.

14. The ld. D.R. for the Revenue was fair enough to concede to the above mentioned submission of the ld. A.R for the assessee. Hence, the order of the ld. CIT(A) on this issue is reversed and the AO is directed to compute the interest income for the purpose of deduction u/s 80HHC as per newly inserted clause (baa) of the Explanation to section 80HHC for computing the eligible profits and gains of business by reducing 90% of the interest receipts which were included in such profits. Orders are passed accordingly."

From a perusal of para 13 of the order passed by the Tribunal,

which records the contentions raised by learned counsel appearing for the assessee, it is evident that he only submitted that as per clause (baa) of the explanation to Section 80HHC of the Act, in order to compute profits and gains of business for the purpose of deduction under Section 80HHC of the Act, 90% of the receipts on account of interest are to be reduced, which are included in such profits. As the interpretation put by the assessee's counsel was strictly in spirit of the language of the Section, the departmental representative conceded on that ground.

No argument was raised by the assessee in support of the ground of appeal in the memo of parties disputing the treatment of interest income under the head `income from other sources'. Meaning thereby that the findings of the authorities below on the treatment of interest income under the head `income from other sources' was admitted. Accordingly, the issue for consideration is that as to whether under these circumstances, only for the purpose of computation of deduction under Section 80HHC of the Act, such interest income could be treated as part of profits and gains of business.

Relevant Clause (baa) of the Explanation to Section 80HHC of the Act, which defines the term profits and gains of business is extracted below:-

> "(baa) "profits of the business" means the profits of the business as computed under the head "Profits and gains of business or profession" as reduced by--
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> (1) ninety per cent of any sum referred to in clauses (iiia), (iiib) and (iiic) of section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits; and
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> (2) the profits of any branch, office, warehouse or any other establishment of the assessee situate outside India;"

A perusal of the above clause shows that deduction of 90% of the receipts on various accounts including on account of interest is to be reduced, hile computing profits and gains of business for the purpose of deduction under Section 80HHC of the Act, which are included in such

profits and not otherwise. As is evident from the facts on record that the interest income earned by the assessee, which was sought to be claimed by him to be dealt with as income from business or profession, was in fact assessed as income from other sources, which order was upheld in appeal by the CIT(A). Even though, in the ground, the assessee had raised the issue for consideration of the interest income as part of the profits of business but the issue was never argued.

Once the conceded position on record is that the interest income earned by the assessee does not form part of income from business or profession, as computed at the time of assessment, there arises no question of deduction of 90% thereof for the purpose of calculation of deductions under Section 80HHC of the Act. The question of deduction of 90% of the income in terms of the clause (baa) of the Act would arise only if the same forms a part of the income from the business or profession.

Any enabling provision for deduction of a part thereof pre-supposes inclusion of the entire under that head without which the provision cannot be given effect to. The interest income cannot be given two different treatment i.e., while computing the income under various heads at the time of assessment and another by calculating the deduction under Section 80HHC of the Act.

Similar question came up for consideration before this Court in I.T.A. No.73 of 2005 – **Commissioner of Income-tax (Central), Ludhiana v. M/s Avery Cycle Inds. Ltd., Ludhiana**, decided on 12.9.2006 wherein the revenue raised the issue that the Tribunal had gone wrong in directing the Assessing Officer to consider the interest income as part of business profit for computing deductions under Section 80HHC of the Act. While considering the issue, this Court found that in fact while framing the assessment in **Avery Cycle Inds. Ltd.'s case, (supra),** the Assessing Officer himself had considered the receipts on account of interest as part of the business income. Under those circumstances, it was held that once the Assessing Officer himself had treated the interest income as part of the income from business, there was no occasion to treat the same differently for the purpose of calculation of deductions under Section 80HHC of the Act. The relevant para from the judgment in **M/s Avery Cycle Inds. Ltd.'s case (supra)** is extracted below:-

> "Once at the time of passing of the assessment order in computing the income from business or profession, the amount of receipt of interest, as mentioned above, has been shown and assessed as income from business or profession, there is no reason for reducing the same out of the income from business or profession for the purpose of calculation of deduction under Section 80HHC of the Act, as after including the same in the income from business or profession, the reduction, as envisaged under that provision, would be carried out. This is clear even from what the Tribunal has directed. Accordingly, we do not find any merit in this contention of the Revenue and hold that once the income is assessed as income from business or profession, the same has to be taken as such for the purpose of calculation of profits of the business in terms of clause (baa) of Section 80HHC of the Act after reducing therefrom 90% of the amount, so referred in the clause.

In view of our above discussion, we find that the assessee having not raised any issue with regard to treatment of interest income under the head `income from other sources' and the same being not part of the business income, there was no occasion for deduction of 90% thereof. If any income form part of the business income then only the question of deduction of 90% thereof would arise. We find that patent illegality has been committed by the Tribunal in accepting the plea of the assessee, which is not in conformity with law. Accordingly, the appeal on this ground is accepted and the order passed by the Tribunal is set aside.

The appeal is disposed of in the manner indicated above.

(RAJESH BINDAL)
JUDGE

May 02, 2007 **(M.M.KUMAR)**
renu **JUDGE**